

State of California
Energy Resources Conservation and Development Commission

In the Matter of :)	Docket No. 97-AFC-1
)	
Application for Certification of)	PREHEARING CONFERENCE STATEMENT
the High Desert Power Project)	OF COMMISSION STAFF
_____)	

INTRODUCTION

On December 16, 1998, the HDPP Committee issued a Prehearing Conference Order, directing parties to file Prehearing Conference Statements on February 9, 1999. The question before the HDPP Committee is whether to commence hearings on those areas that are fully analyzed, or to postpone hearings until a complete analysis of the entire project is available. This Prehearing Conference Statement responds to that Order and addresses issues associated with the HDPP schedule.

BACKGROUND

The High Desert Power Project, Limited Liability Company (applicant) filed an Application for Certification (AFC) for the High Desert Power Project (HDPP) with the California Energy Commission (Energy Commission) on June 30, 1997. The application was deemed complete at the December 3, 1997 Business Meeting. At the Business Meeting, several Commissioners expressed concern about the ability of the applicant to provide the information necessary for the Energy Commission to issue a decision on the project within the 12-month statutory deadline. (12/3/97;Tr. 37 – 93). However, in light of assurances by the applicant that it would be able to meet the scheduling requirements, the Energy Commission found the application complete and directed staff to begin its analysis of the proposed project.

More than one-and-one-half years have passed since the Energy Commission began its review of the application, and the applicant is still unable to provide information in key areas at a level of detail that allows certification. The applicant has not presented a valid offset package, causing the United States Environmental Protection Agency (EPA) to formally notify the Mojave Desert Air Quality Management District (District) that it is "obligated to object to the issuance of the revised [Preliminary Determination of Compliance] . . ." Due to the applicant's decision to add a major component to the project -- a second, 32-mile natural gas pipeline which requires a federal lease -- six months after the licensing process began, assessment of biological and cultural resource impacts by the United States Fish and Wildlife Service (USFWS) and Bureau of Land Management (BLM) is only now beginning. Finally, uncertainties about the efficacy of various measures required by the Victor Valley Water District (VVWD) as a condition of providing water to the project means that the project does not yet have a viable water supply.

Moreover, it is important to note that the applicant bears a significant degree of responsibility for this situation. There is nothing inherent in the new competitive market that creates these problems. In this case, the applicant has repeatedly chosen to present incomplete or inadequate project features, and when the inadequacies are duly identified by staff, propose project modifications. This pattern was followed in three critical technical areas – air, water, and biology. For example, knowing that the project would require more than 200 tons per year (tpy) of nitrogen oxide (NOx) offsets and almost 150 tpy of volatile organic compound (VOC) offsets, the applicant chose to locate the project in an air district whose emission bank contained zero NOx and VOC credits. The applicant failed to present an offset plan that addressed the lack of fungible offset credits until November 1998, eleven months after the application was deemed data adequate. The applicant also failed to ascertain what kinds of mitigation measures would be required by the local water district for service until eight months after the AFC process began. The applicant refuses to consider dry cooling despite the fact that the water basin suffers from an overdraft of 68,000 acre-feet per year, and that the adjudication of the basin is in litigation. Finally, five months into the process, the applicant added a second natural gas pipeline that did not utilize approved utility corridors. The applicant then modified its proposal again to propose a different second natural gas pipeline -- one that requires a lease from the BLM and potentially impacts both a major cultural resources site and critical desert tortoise habitat.

In contrast, the Sutter AFC went to hearings within ten months of data adequacy despite undergoing several project modifications in response to environmental concerns raised by the public, agencies and staff. The Pittsburgh AFC, and the La Paloma AFC are proceeding with one-year schedules. The applicant may choose to proceed to hearings at this time without resolution of air quality, water resources and biological resources, but staff believes the only outcome of conducting these hearings would be to deny the application. Staff is willing to work with the air, water, and wildlife agencies to assist the applicant in resolving issues. However, until there is some indication about how and when such resolution will occur, staff strongly recommends against scheduling hearings on these issues.

RECOMMENDATION

The Staff Assessment filed on January 21, 1999 states that if the Energy Commission were to make a decision on the AFC at this time, staff would recommend denial of the AFC. At this time, however, we do recommend proceeding to hearings on the sixteen areas that we have identified as substantially complete, and on hazardous materials management (see below). As stated above, we oppose scheduling any hearings in the areas of biology,¹ air quality and water resources as unnecessarily wasteful of staff and HDPP Committee resources.

¹ In its Staff Assessment, staff stated that the measures it identified to mitigate potential impacts to biological and cultural resources from construction and operation of the second natural gas pipeline were complete, pending federal agency action. Comments received at the February 3 workshop indicate that supplemental testimony on biological resources will be required. The federal agencies will identify the measures they believe are necessary to mitigate biological and cultural resources impacts no earlier than August 1999.

We further recommend that the HDPP Committee direct the applicant to work with EPA, California Air Resources Board (ARB), the District, and staff to resolve air quality issues, including the sufficiency of the offset package. Staff has tentatively set the date for an air quality workshop with EPA, ARB, and the District for the week of February 22, 1999. Staff will report to the HDPP Committee on the progress of those discussions.

The HDPP Committee should also direct the applicant to work with VVWD, the Mojave Water Agency (MWA), USFWS, the California Department of Fish and Game (CDFG), the Lahontan Regional Water Quality Control Board (RWQCB), and staff to resolve biology and water issues associated with water banking. The discussions with these agencies about the effectiveness of water banking and appropriate monitoring plans will begin on February 16, 1999. Staff will report to the HDPP Committee on the progress of those discussions.

RESPONSE TO PRE HEARING CONFERENCE ORDER

The Prehearing Conference Order directs parties to answer a series of questions regarding the project schedule. Staff's responses are as follows:

TOPIC AREAS READY TO PROCEED TO HEARINGS

There are sixteen technical areas for which staff's analysis is complete and for which we do not anticipate any need to file supplemental testimony. These areas are:

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|--|-----------------------------------|
| 1. need conformance | 9. visual resources |
| 2. public health | 10. cultural resources |
| 3. worker safety and fire protection | 11. socioeconomics |
| 4. transmission line safety & nuisance | 12. paleontological resources |
| 5. waste management | 13. facility design |
| 6. land use | 14. reliability |
| 7. traffic and transportation | 15. efficiency |
| 8. noise | 16. transmission line engineering |

TOPIC AREAS NOT READY TO PROCEED TO HEARINGS

The Staff Assessment stated that two areas were incomplete: air quality and water resources. It also identified biological and cultural resources as complete pending federal agency action. As a result of the workshops held last week, staff is adding biology and hazardous materials management to the list of incomplete areas, but is concluding that cultural resources is substantially complete. The issues associated with these topic areas are discussed below.

AIR QUALITY

Although the Staff Assessment includes a complete assessment of the air quality impacts of the applicant's proposal, resolving EPA's objection to the revised preliminary DOC will undoubtedly involve additional changes to the applicant's proposal. EPA's letter to the District on the DOC, dated January 15, 1999, states that:

“If the District proceeds to issue the [preliminary] DOC as a final determination without revising it to correct the inadequacies discussed in the enclosed comments, the High Desert Power Plant may be subject to federal enforcement, if it commences any construction of the proposed project. At a minimum, such construction would violate LAER [lowest achievable emission rate] requirements and SIP [state implementation plan] Rule 1305 [District rule governing interpollutant trading].”

Staff reached a similar conclusion in its assessment of the proposal. Although the Applicant has agreed to implement some of EPA's recommendations on the issues of LAER and BACT, critical issues associated with the appropriate interpollutant offset ratio and the validity of offsets proposed for the project remain unresolved. Rather than hold hearings on these issues at this time, staff supports EPA's recommendation that the parties work together in the ensuing months to try to reach resolution. (See Staff Assessment, page iv.) We were not able to schedule a meeting with EPA until after the Prehearing Conference and thus cannot estimate the length of time it will take to resolve these issues.² Staff recommends refraining from scheduling hearings on air quality until the air regulatory agencies' concerns have been fully addressed.

WATER

There are three outstanding issues in the areas of water resources. The first concerns the effectiveness of measures being considered to mitigate project impacts. The Mojave Water Agency (MWA) has provided preliminary conditions for providing State Water Project (SWP) water to the project and the Victor Valley Water District (VVWD) has provided preliminary conditions for use of ground water as a backup water supply for the project. However, there is a question about the effectiveness of one of these conditions -- banking of surface water in a ground water aquifer. The California Department of Fish and Game (CDFG) and the United States Fish and Wildlife Service (USFWS) have raised concerns that the condition may not be effective in preventing impacts to riparian habitat. In addition, the MWA must approve any banking proposal that is part of the project. USFWS, CDFG, staff, local agencies, and the applicant will meet on February 16 to decide how and when conditions of certification can be drafted that address these concerns. Staff will not recommend proceeding to hearings on water until the acceptable conditions of certification addressing the banking and monitoring proposal have been developed. We hope to be able to provide a tentative schedule for this process at the Prehearing Conference.

The second issue concerns water quality. Under state regulations, banking of surface water in a ground water aquifer may require a waste discharge permit from the Regional Water Quality Control Board (RWQCB). As banking is one of the preliminary conditions imposed by VVWD, the applicant made a banking proposal to the Lahontan RWQCB. The agency initiated a review, but subsequently decided to defer issuance of a decision until after the Energy Commission decision on the AFC. Thus, staff will need to develop

² We note that this is the first licensing case at the Commission involving the use of inter-basin, inter-pollutant ERCs. As it may establish a precedent for future cases, it is critical that the Commission and other regulatory agencies devote the time necessary to ensure that a scientifically-defensible approach is developed.

the conditions that it believes are likely to be imposed by the Lahontan RWQCB. Staff estimates that this will take two months.

Third, there are significant outstanding issues associated with the availability of SWP water. The California Supreme Court will hear arguments on the Mojave Basin ground water adjudication later this spring. A decision to either uphold or overturn the decision of the Court of Appeal may affect the ability of the applicant to secure either SWP water or groundwater for the project. As a result, the Committee may prefer to wait until this critical issue is resolved before scheduling hearings. In addition, both the California Unions for Reliable Energy (CURE) and members of the public have raised questions about the long-term availability of SWP water for the project. Although staff's analysis of this issue is complete, other parties consider this a contested area.

Finally, we note that as a result of the concerns expressed at the workshops about the water issues, staff plans to conduct a more thorough analysis of dry cooling, which would avoid these potential impacts, but the feasibility of which is uncertain. Staff already possesses sufficient information to conduct the analysis and will provide its results at the same time as the proposed conditions of certification regarding treatment of SWP water prior to groundwater injection.

BIOLOGICAL RESOURCES

USFWS and BLM staff are only now initiating their review of the second natural gas pipeline. Staff believes that USFWS and BLM will identify mitigation similar or identical to that identified by staff in the Staff Assessment for impacts to cultural and biological resources. Comments at the workshop indicate that staff's cultural resources analysis is essentially complete, but that staff's biology analysis should be supplemented to provide a more detailed discussion of the effectiveness of the proposed mitigation measures. This additional testimony will take approximately one month to prepare. The Committee may also wish to consider the option of withholding judgment on the second natural gas pipeline until USFWS and BLM are able to provide information about requirements that they are likely to impose

Furthermore, staff needs to supplement its testimony to include a discussion of the potential effects of the applicant's water banking proposal on the riparian habitat of the Mojave River. This supplement can not be provided until the evaluation of the applicant's banking proposal is complete. As discussed above, CDFG is also very concerned about the effects of groundwater pumping on riparian habitat. USFSW has expressed the same concern and staff expects both agencies to participate in the discussions about the effectiveness of banking at the February 16 workshop. We will summarize the results of that meeting at the Prehearing Conference.

Finally, on December 17, 1998, CURE served notice that it intends to sue the BLM for failure to consult with USFWS regarding the California Desert Conservation Area Plan. The California Desert Conservation Area Plan established the utility corridor in which the applicant has proposed to construct the second natural gas pipeline. Conceivably, resolution of the legal issues raised by CURE could significantly delay federal agency review and approval of the second natural gas pipeline. Even if the issues raised by

CURE do not delay federal review and approval, it is not likely that the federal agencies will act on the proposal before them until the summer or fall of 1999.

HAZARDOUS MATERIALS MANAGEMENT

At the February 5, 1999 workshop, CURE identified concerns regarding the transportation of hazardous materials. Staff addressed this issue under the topic of traffic and transportation in the Staff Assessment, but agrees that this analysis needs to be supplemented. The testimony on hazardous materials management will be updated to address CURE's concern within two weeks.

WITNESS IDENTIFICATION AND QUALIFICATIONS

Staff's witnesses by topic area, and their qualifications, can be found in the Staff Assessment. Staff is proposing to add Keith M. Golden as a witness to represent staff's air quality testimony. Their qualifications are included in the Staff Assessment. Matthew Layton will prepare the analysis of dry cooling; his qualifications will be provided at the same time as his testimony. Time estimates for direct testimony are 15 minutes for each area that is uncontested. If hearings are held prior to resolution of air, water, and biology issues, we believe that these areas will take one to two days each of hearings.

EXHIBITS

The only exhibits that staff will introduce are: 1) the Staff Assessment, 2) errata to Staff Assessment that may result from workshop discussion, and 3) any additional or supplemental testimony that results from efforts to address air quality, water and biological resources, or hazardous material management issues on the project.

PROPOSED SCHEDULE

Staff is prepared to participate in hearings on the sixteen technical areas identified above and on hazardous materials management. However, we oppose any hearings on the issues associated with biology, water, or air quality. There are two compelling reasons for deferring these hearings.³ First, the applicant may be required to propose additional changes to the project in order to be licensed. For example, the applicant may need to modify its offset proposal or acquire additional emission reduction credits (ERCs). In addition, a detailed mitigation and monitoring plan must be developed for any groundwater banking program to be feasible. The applicant may also need to consider dry cooling to reduce water usage, which could affect staff's facility design, power plant efficiency, visual resources, water resources, biological resources, waste management, land use, and noise assessments.⁴ The schedule in this case has already been significantly delayed, in part due to project amendments, including a second natural gas pipeline, a revised water plan, a shortened stack height, a revised best available control technology (BACT) proposal, and a completely different offset

³ The biology section of the Staff Assessment must be modified to reflect the discussions about the impact of water usage on the riparian habitat of the Mojave River, as well as provide more specificity about the mitigation measures. Although the latter supplement could be provided within one month, staff cannot complete the former until assessment of the applicant's water banking proposal is concluded.

⁴ In the Sutter Power Project (97-AFC-2) the switch to dry cooling delayed the project approximately two months; most of the time was required by the applicant to develop engineering details.

package that relies on interpollutant interbasin offsets. The need to address additional details in the HDPP renders any hearings on these three issues premature. We believe it is more appropriate to use our limited resources to analyze the final project configuration, than to continue analyzing portions of the project that may undergo another round of changes.

Second, even if there are no additional major changes to the HDPP, there are a number of other applicants who have filed or who are about to file AFCs with the Energy Commission. The profusion of siting cases means that staff must be very efficient in allocating its resources. HDPP spent six months in prefilings, six months in data adequacy, and more than one year in discovery and is still not ready for adjudication. Four additional cases are currently undergoing active review. We expect eight more projects to be filed before the end of the fiscal year 98/99. We believe that staff should not be required to allocate yet more resources to litigating technical areas with unresolved issues until there is some indication about how and when those issues will be resolved.

The applicant and CURE have both indicated that they will provide written comments on the Staff Assessment prior to the February 18, 1999 Prehearing Conference. If these comments are minor, staff will be able to file written errata to address these comments and participate in hearings on the sixteen areas that it has identified as complete in mid to late March 1999, should the HDPP Committee decide such hearings are appropriate.⁵ We should be able to advise the HDPP Committee on the nature of these comments at the Prehearing Conference. We will file supplemental testimony to address CURE's comments on hazardous materials management within two weeks of this Prehearing Conference Statement, and will be ready to proceed to hearings on this topic mid to late March 1999. We do request that if the HDPP Committee establishes filing dates for testimony of other parties, that staff, the applicant, agencies and other parties be provided at least two weeks to review any such testimony before hearings are conducted.

In the interim, we will continue working with other parties to fully address the water banking proposal, and will provide an estimated schedule for resolution of this issue at the Prehearing Conference. Staff will also continue to monitor the litigation of the Mojave Ground Water Basin Adjudication and will be able to report whether its resolution has any effect on the project at the same time. However, we note that resolution of the Mojave Ground Water Basin Adjudication has a potential impact on the availability of SWP water, and thus, on the viability of the project as proposed. As a result, staff may recommend conditions of certification to address this uncertainty. Staff's conditions may include a requirement that the applicant to either shutdown the facility or retrofit the project with dry cooling should ground water drawdown exceed a specified criterion during the life of the project. We realize that these potential conditions add substantially to the financial uncertainty to the project. Alternatives include delaying hearings on water resources and biological resources until there is greater

⁵ We note that the downside of proceeding to hearings on these topics is that if the remaining issues can not be resolved, staff and the HDPP Committee will have expended substantial resources with little to show for it.

certainty on how the Mojave Ground Water Basin Adjudication will be addressed, or to allow the applicant to incorporate dry cooling.

At this time, we oppose scheduling any hearings in the areas of biology, air quality and water resources as unnecessarily wasteful of staff and HDPP Committee resources. Although staff's analysis of dry cooling, drafting of potential water treatment conditions, and revised discussion of biological resources mitigation measures will be complete by April 9, 1999, other critical water, biology, and air quality issues will not be resolved by that time. We will have additional information after the workshops on these topics, scheduled for later in February, at which time we will report to the HDPP Committee. We recommend that the HDPP Committee ask parties to report when resolution of the air quality issues is near (e.g., when EPA and ARB have approved the second revised preliminary DOC), and when a water banking monitoring and mitigation plan is fully developed in order to schedule the remainder of the hearings.

Respectfully submitted,

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